UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MICHAEL FUQUA, appellant v. DEPARTMENT OF THE NAVY, agency	DOCKET NUMBER SF07528510A DATE: JUL 0 6 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency has petitioned for review of a December 5, 1985, initial decision which mitigated appellant's removal to a 45-day suspension. The petition for review is GRANTED under 5 U.S.C. § 7701(e)(1), the initial decision is REVERSED, and the decision of the agency to remove appellant is SUSTAINED.

BACKGROUND

Appellant was employed as an Insulator Apprentice with the Long Beach Naval Shipyard. He was removed from his position based on charges of excessive unauthorized absence and falsification of an official document. Appellant appealed his removal to the Board's Denver Regional Office.

After a hearing, the presiding official found that: (1) the agency had properly denied appellant's requests for sick leave, since he had failed to present acceptable medical documentation regarding his illness as the agency had

requested;[1] and (2) appellant had falsified his leave application for the period in question by inserting "out due to illness" in the remarks section of the document for two days when he had, in fact, been incarcerated. Accordingly, the presiding official sustained both charges, finding that the agency had proven them by a preponderance of the evidence.[2] Although he found that disciplining appellant under the circumstances would promote the efficiency of the service, the presiding official concluded that appellant's removal was unreasonably severe and mitigated the penalty.

Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), as authority for the proposition that the Board's role is not to select the penalty, but rather to "review the agency decision to see that the relevant factors were considered and that the agency selection is tolerably reasonable," the presiding official selected the following factors as most relevant for determining the appropriateness of the penalty in this case: (1) the nature and seriousness of the offense; (2) appellant's past disciplinary record; and (3) appellant's past work record. Initial Decision (I.D.) at 7-8. The presiding official found that excessive absences and falsification of official documents are serious offenses that undermine the trust necessary to an effective employer-employee relationship. The presiding official also noted that

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1/ With regard to the charge of unauthorized absence, appellant was specifically charged with being absent from work without approval for the period of January 16-25, 1985. Because appellant's request for sick leave covered a period of more than three days, it was the agency's prerogative to require appellant to provide it with suitable medical documentation to support such leave. See 5 C.F.R. § 630.403, which also allows the agency to request documentation for a lesser period when deemed necessary.

2/ The presiding official also determined that appellant had failed to establish his affirmative defense alleging that the agency action was taken as a reprisal for his filing of prior EEO complaints and grievances.

appellant had a rather extensive past disciplinary record.[3] He further described appellant as having "had some difficulty in the year preceding his removal in conforming his behavior to agency expectations." I.D. at 8. While finding that appellant's work record had been good for the first three years of his employment, the presiding official stated that "personal problems" and an admitted "bad attitude" on appellant's part contributed to a deterioration of that record over his last year of employment.[4] *Id.*

The presiding official considered several "mitigating circumstances" in connection with his assessment of the reasonableness of the penalty. I.D. at 9. The first was the nature of the tasks assigned to appellant. In this regard, the presiding official determined that appellant had been assigned a disproportionate amount of time on "asbestos ripout," an allegedly "[illegible] hot, and tedious job." *Id.* The presiding official also noted the allegedly poor relationship between appellant and his supervisors, and concluded that appellant's problems during his last year of employment stemmed, at least in part, from allegedly unfair treatment by those supervisors. I.D. at 10. Finally, the

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[3] Appellant was given a letter of reprimand dated March 16, 1984, for unauthorized absence on February 10, 1984. He was suspended for one day, effective September 26, 1984, for unauthorized absence of 1.2 hours on June 29, 1984. He was suspended for five days, effective February 11, 1985, for: (1) unexcused tardiness on August 7, 1984; (2) being onboard a government barge without authorization during non-duty hours on August 19, 1984; (3) sleeping on duty on November 20, 1984; and (4) unauthorized absence of 1.2 hours on November 28, 1984.

[4] In this regard, we note that the agency scheduled an appointment for appellant with its Civilian Employee Assistance Program counselor in order to help him with his alleged personal problems. Appellant, however, failed either to report for the initial appointment or to contact the counselor for follow-up counseling sessions, as he had been instructed to do. Appeal File (A.F.), tab 5, subtab E.

presiding official found that the agency's deciding official had assigned more weight than appropriate to appellant's 75 hours of unauthorized absence during his last year of employment. *Id.*

Although admitting that appellant's misconduct exhibited "poor judgment on his part," the presiding official nevertheless found that appellant did not intend to defraud the agency by his act of falsifying his leave request form and that "his behavior is less serious than that found in most falsification cases." I.D. at 10-11. The presiding official also found that since "there is potential for the appellant's rehabilitation, . . . he should be given another chance." I.D. at 11. He concluded that the agency had ignored its own regulations, which required the selection of the minimum disciplinary action likely to correct the improper behavior. *Id.*

In its petition for review, the agency contends that the presiding official erred in finding that the penalty of removal was unreasonable for the sustained charges. We agree.

ANALYSIS

The presiding official erred in finding that the penalty of removal was unreasonable for the sustained charges.

In *Douglas, supra*, the Board held that it would apply a "reasonableness" test in determining whether the agency-imposed penalty was appropriate. There, we stated that "[o]nly if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Id.* at 306. Whether the presiding official would have chosen a different penalty, had he been making the initial choice, is not ordinarily a valid concern. *Id.* Therefore, once the agency has proven the pertinent factors on

which its decision rests by the requisite standard of proof, the appropriateness of the penalty is primarily a matter of the agency's informed judgment and managerial discretion. *See Schapansky v. Department of Transportation, F.A.A.*, 735 F.2d 477, 484 (Fed. Cir. 1984); *Douglas, supra*.

The record reveals that appellant was first counseled with regard to his unacceptable behavior, then repeatedly warned, and, finally, progressively disciplined for offenses he committed. A.F., tab 5. Appellant was also cautioned that repetition of those offenses or of other violations might result in a more severe penalty, including removal from employment. *Id.*

Both of appellant's charged offenses were serious.[5/] Furthermore, this was appellant's fourth offense with regard to the charge of unauthorized absence. Unauthorized absence from duty has long been held to be proper grounds for removal, since by its very nature it disrupts the efficiency of the service. *See Desiderio v. U.S. Department of the Navy*, 4 M.S.P.R. 84 (1980).

In order to sustain a charge of submitting false information on official government documents, the agency must prove by a preponderance of the evidence that the employee knowingly supplied incorrect information, and that he or she did so with the intention of deceiving or misleading the agency. *See Naekel v. Department of Transportation*, 782 F.2d 975 (Fed. Cir. 1986). We find that the agency met its burden in the instant case. In his initial decision, the presiding official was unable to find that appellant's falsification of his request for sick leave evinced an intent to defraud the

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5/ The Department of the Navy's table of penalties permits the maximum penalty of removal for the first offense of either excessive unauthorized absence or falsification of an official document. A.F., tab 5, subtab N.

agency.[6] I.D. at 10-11. However, our review of the record reveals that appellant did, in fact, knowingly supply false information to the agency in order to keep the fact of his incarceration secret. Moreover, we agree with the presiding official's finding that "[a]lthough his supervisor's comments[7] may have led him to believe that [appellant] could get away with the falsification, they [did] not justify his actions." I.D. at 6. The Board has held that the submission of a false document to the agency, regardless of the motivation, is a breach of the employer-employee relationship and constitutes a proper basis for disciplinary action. *See*

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[6] The presiding official reasoned that the entire period of appellant's absence was covered by his leave requests, since the amount of annual leave requested corresponded with the length of time he was incarcerated and the amount of sick leave requested corresponded with the length of time he was actually sick. I.D. at 10. However, the presiding official had also previously found that: (1) the agency had properly denied appellant sick leave because he did not adequately document his illness as per the agency's request; and (2) the agency did not abuse its discretion by denying appellant's request for annual leave after discovering that he had falsified the reason for the leave. I.D. at 5. The leave requests relied upon by the presiding official in his analysis were the same requests that were found to be properly denied by the agency. We find that the fact that appellant had adequate leave time available to cover all of his requests neither excuses his unauthorized absences nor mitigates his fault in falsifying his leave request form with the intent of deceiving the agency. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (in reviewing an initial decision, Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning).

[7] Appellant asserts that his supervisor advised him that he could request sick leave for the entire period of his absence from work (including the time spent in incarceration). However, the presiding official construed the supervisor's remark as meaning that if appellant were, in fact, ill for the time in question, he could then use that reason as the legitimate basis for his leave request. I.D. at 5-6.

Montgomery v. Department of the Army, 21 M.S.P.R. 667, 670 (1984). Removal for falsification of government documents promotes the efficiency of the service, since such falsification raises serious doubts as to the employee's honesty and fitness for employment. *See McCreary v. Office of Personnel Management*, 27 M.S.P.R. 459, 462-463 (1985).

The circumstances considered by the presiding official in his decision to mitigate the penalty to a 45-day suspension do not outweigh the factors supporting the removal penalty, including the seriousness of the sustained offenses and appellant's poor past disciplinary record.[8/] Appellant has shown little potential for rehabilitation. Even though the agency attempted to improve appellant's poor pattern of attendance through counseling, warnings, and a series of appropriate disciplinary actions, his poor attitude apparently persisted, culminating in the charges which are the basis of the instant action. Appellant's other prior acts of misconduct (*i.e.*, tardiness, unauthorized absences, sleeping on duty, and unauthorized presence on government property), further serve to establish his lack of rehabilitation potential. The Board finds, therefore, that the agency's action in removing appellant did not clearly exceed the limits of reasonableness and that appellant's removal is appropriate under the circumstances. *See Villela v. Department of the Air Force*, 14 M.S.P.R. 206 (1982), *aff'd*, 727 F.2d 1574 (Fed. Cir. 1984) (Board held that penalty of removal was reasonable for employee's unauthorized absence, in light of employee's past disciplinary record and fact that he had been informed that removal could be imposed if further misconduct occurred).

8/ Appellant's prior disciplinary actions were properly considered by the agency in imposing the penalty of removal. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335 (1981).

NOTICE

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no

later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.